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CHARLES ELMORE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

## No. 282.

HELEN C. JOHNSON, HERBERT F. JOHNSON, JR., HENRIETTA J. JOHNSON, AND JOHN J. LOUIS, PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF S. C. JOHNSON & SON, APPELLANTS,

VS.

ARTHUR STAR, APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS.

## BRIEF FOR APPELLANTS.

SPEARMAN WEBB,
*Attorney for Appellants.*

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## BRIEF FOR APPELLANTS.

1.

### THE OPINIONS OF THE COURTS BELOW.

The opinion of the Supreme Court of Texas is printed in the record, page 58. It is reported in 47 S. W. (2d) 608.

The opinion of the Court of Civil Appeals declared to be correct by the Supreme Court of Texas is printed in the record, page 13, and reported in 44 S. W. (2d) 429.

The opinion of the Supreme Court of Texas adopts the reasoning of the same court in *Patty-Joiner and Eubank Company* v. *Cummins*, 93 Texas 598, 57 S. W. 566, and in *Hajek and Simicek* v. *Luck*, 96 Texas 517, 74 S. W. 305, and holds that the questions at issue here have been definitely settled in Texas by these former holdings. For convenience these opinions are printed in this brief on pages 43 and 50, respectively.



## STATEMENT OF THE CASE.

Appellants are judgment creditors of the Dallas Showcase and Manufacturing Company, having obtained a judgment in the state courts, on which there is an unpaid balance of $103.08.

On March 13, 1931, the Dallas Showcase and Manufacturing Company, a corporation, while insolvent, executed a deed of assignment to Arthur Star, the appellee herein.

The assignment was purely a statutory one according to the agreed statement of facts which contains the following:

> "In compliance with the statutes and ACTING UNDER THE AUTHORITY THEREIN CONFERRED AND PURSUANT THERETO, said

> Arthur Star, garnishee herein, as such assignee, took possession of all of the assets and property of said corporation and proceeded to convert same into cash" (R. p. 8).

Appellants did not accept under the assignment, and duly attacked its validity on April 19, 1931, by suing out a writ of garnishment and serving the same upon Arthur Star, assignee, who answered (R. p. 2), that he was not indebted to the Dallas Showcase and Manufacturing Company, nor had he assets of said company, but that he held in his hands as assignee for the benefit of creditors of the Dallas Showcase and Manufacturing Company the sum of $582.63, which he claimed to hold under the authority of Title 12, Texas Revised Civil Statutes 1925, "Assignment for Creditors Act" (Articles 261-274), which funds he alleged were not, for that reason, subject to garnishment and asked to be discharged.

So far as the record discloses, none of the creditors have accepted under the assignment. The only statement in the record in regard to the creditors is a statement of the amount owing by the insolvent corporation to unsecured creditors, the record being silent as to the amount of claims held by *accepting* creditors, if any there be. There is no means of determining by this record whether or not as much as or more than one-third of the amount of the respective claims of *accepting creditors* will be paid. It is therefore not made to appear in the record whether the STATUTORY DISCHARGE of the unpaid portion of the debts would become effective and *appellants would necessarily have*

*to consent to the statutory provision discharging the unpaid portion* in the event the necessary one-third was eventually paid.

The trial courts held that Title 12 of Revised Civil Statutes 1925, Assignment for Creditors Act (Arts. 261-274), as applied to this case is invalid, being in conflict with and repugnant to Art. 1, Sec. 8, cl. 4 of the Constitution of the United States and the National Bankruptcy Act (R. p. 11), and that such deed of assignment did not pass title to the assignee as against appellants who were non-assenting creditors and who timely (within four months) proceeded by garnishment against the assignee and who could not because of the smallness of their claim and without the cooperation of other creditors avail themselves of the Bankruptcy Act, and that the funds were therefore subject to garnishment or attachment.

The assignee appealed to the Court of Civil Appeals asserting that the trial court erred in holding Title 12, Rev. Tex. St. 1925, is invalid and in conflict with and repugnant to the Federal Constitution and the National Bankruptcy Act which court held in favor of the validity of the state law (R. p. 13).

Appellants sued out a writ of error to the Supreme Court of Texas, again asserting the invalidity of Title 12, Revised Statutes 1925, as being in conflict with the Federal Constitution and the Bankruptcy Act and the Supreme Court of Texas held in favor of the validity of the State law (R. p. 58).

To which holding appellants have cited error (R. p. 59) and have brought this case for review by this Honorable Court.

**The Statutes in Question.**

Title 12, Revised Civil Statutes 1925, Assignment for Creditors Act (Articles 261-274), reads as follows:

> Art. 261. GENERAL ASSIGNMENT.—Every assignment made by a debtor for the benefit of his creditors shall provide for a distribution of all of his real and personal estate among all of his creditors consenting thereto, in proportion to their respective claims, and however made or expressed shall have the effect aforesaid and shall be construed to pass all such estate, whether specified therein or not. The term "real and personal estate" shall not include property exempt by law from execution (Acts 1879, p. 57; G. L., Vol. 8, p. 1357).
>
> Art. 262. DETAILS OF ASSIGNMENT.—Assignments shall be in writing and proved or acknowledged and recorded in the manner provided by law for conveyances of real estate, and the debtor shall annex to such assignment an inventory containing the following statement:
>
> 1. A list of all the creditors of such debtor or debtors;
> 2. The place of residence of each creditor, if known;
> 3. The sum owing to each creditor, and the nature of the debt or demand;
> 4. The consideration of such indebtedness in each case, and the place where such indebtedness arose;
> 5. A statement of any existing judgment or security for the payment of any such debt;

6. An inventory of all such debtor's estate at the date of such assignment, both real and personal, and any incumbrances existing thereon, and of all vouchers and securities relating thereto, and the value of such estate.

Such inventory shall be signed and sworn to by the assignor or assignors that the same is just and true (*Id.*).

Art. 263. DISCHARGE OF LIABILITY.—A debtor may make such assignment and shall thereupon stand discharged from all further liability to such consenting creditors on account of their respective claims. Such debtor shall not be discharged from liability to such creditor who does not receive as much as one-third of the amount due and allowed in his favor as a valid claim against the estate of such debtor (Acts 1883, p. 46; G. L., Vol. 9, p. 352).

Art. 264. NOTICE OF ASSIGNEE'S APPOINTMENT. —Every assignee shall, within thirty days after the execution of an assignment, give public notice of his appointment in some newspaper printed in the county where the assignor resides or where his principal business was conducted. If no newspaper be printed therein, then such notice shall be published in the newspaper nearest to such place of residence or business. Such notice shall be published for three successive weeks. The assignee shall also give notice by mail to each of the listed creditors of the assignor (Acts 1879, p. 57; G. L., Vol. 8, p. 1357).

Art. 265. ACCEPTANCE OF CREDITORS.—The creditors of the assignor consenting to such assignment shall make their written consent known to the assignee within four months after the notice provided in the preceding article. No creditor not assenting shall receive or take any benefit under the assignment. Any creditor who had no actual notice of such assignment may assent before any

distribution of assets under the assignment. The receipt by a creditor of any portion of his claim from the assignee, shall be conclusive evidence of the assent of such creditor to the assignment (*Id.*).

Art. 266. QUALIFICATIONS AND BOND OF ASSIGNEE.—Every such assignee shall be a resident of this state and of the county in which the assignor resides, or in which his principal business was conducted, and he shall forthwith after the execution and delivery of the assignment, cause the same to be recorded in the county of such assignee's residence and in every county in which there is any real property conveyed to him by such assignment; and shall execute a bond with sureties to be approved by either the judge of the county or district court in the county of the residence of said assignee, in such sum as may be fixed by said judge, conditioned that he will faithfully discharge his duties as such assignee, and that he will make proportional distribution of the net proceeds of the assigned estate among the creditors entitled thereto. Such bond shall be payable to the State of Texas and shall be filed with the county clerk of the county in which such assignee resides, and shall inure to the benefit of the assignor and creditors. Upon filing said bond, the assignee shall take possession of the assigned property and proceed to execute the assignment; and if such assignee shall not within five days after the delivery of the assignment, execute an approved bond and file the same as herein provided, such assignment shall nevertheless take effect as against the assignor and his creditors. It shall be the duty of the county judge or judge of the district court of the county in which the assignee resides, either in term time or vacation, upon the application of the assignor or any creditor, and being satisfied that such bond has not been given, approved and filed, to appoint in writing another competent as-

signee who shall, upon the execution of such bond approved and filed as herein provided, take posession of the assigned property and proceed to execute the assignment. In case of vacancy by death or otherwise, of any assignee, or upon removal of any assignee by the district or county judge for just cause, such judge shall appoint another in his place (Acts 1883, p. 46; *Id.*; G. L., Vol. 8, p. 352).

Art. 267. FRAUD WILL NOT DEFEAT ASSIGNMENT.—No fraudulent act, intent or purpose of the assignor or assignee shall have the effect to defeat the assignment or to deprive the creditors consenting thereto from the benefits thereof; and any consenting creditor may be or become a party to prosecute or defend in any suit or proceeding necessary or proper for the enforcement of his rights under such assignments, or for the protection of his interests in the assigned property (*Id.*).

Art. 268. FRAUDULENT SALE BY ASSIGNOR.—Except as to innocent purchasers for value, all property conveyed or transferred by the assignor previous to and in contemplation of assignment with the intent or design to defeat, delay, or defraud creditors, or give preference to one creditor over another, shall pass to the assignee by the assignment, notwithstanding such transfer; and the assignee, or in case of his neglect or refusal, any creditor or creditors may in his name, upon securing such assignee against cost or liability, sue for, recover and collect the same, and cause the same to be applied for the benefit of creditors as other property belonging to the debtor's estate in the hands of the assignee (Acts 1879, p. 57; G. L., Vol. 8, p. 1357).

Art. 269. PROOF OF CLAIM, ETC.—Every creditor consenting to an assignment shall within six months from the time of the first publication of the notice of the appointment of the assignee,

file with such assignee a distinct statement of the particular nature and amount of his claim against the debtor, which shall be supported by an affidavit of the creditor, his agent or attorney, that the statement is true, that the debt is just and that all proper credits or offsets have been allowed, and the assignee shall allow such claims as a valid claim against the estate unless he has good reason to believe it is not just and true. No creditor shall take any benefit under any assignment who neglects to file such statement within such time. The assignor or any creditor disputing such claim may, within eight months after such first publication, sue to set aside any allowance made by the assignee, and to restrain the payment thereof, and such action shall be tried as in other cases. The assignee shall furnish to any creditor upon request a copy of any statement of a claim that has been filed with such assignee (*Id.*).

Art. 270. DIVIDEND AND ALLOWANCE.—Whenever any assignee shall have in his hands funds sufficient to pay ten per cent of the debts due by the assignor, he shall make a pro rata distribution of the same among said creditors, entitled thereto; and the assignee shall be entitled to reasonable compensation for his services and his necessary costs and expenses, including also, his attorney's fees, to be allowed by the county or district judge (*Id.*).

Art. 271. SURPLUS.—Any creditor not consenting to the assignment may garnishee the assignee for any excess of such estate remaining in his hands after the payment to the consenting creditors (of) the amount of their debts and the costs and expenses of executing the assignment (*Id.*).

Art. 272. EXAMINATION OF ASSIGNOR, ETC.—The judge of the court in which any proceedings shall have been filed may, on the application of the assignee, or of any creditor of the assignor,

or without such application if the judge see fit, at all times require, upon such reasonable notice as the judge may direct, the assignor or any other person to attend and submit to a sworn examination upon all matters relating to the disposition made, or status of the property of the estate assigned, including all transactions in the past bearing upon the rights of the assignee or creditors with respect to the estate in assignment, as contemplated in law. The judge may enforce attendance and obedience to such orders so made by a writ or order as in other cases. Such examination shall be in writing, signed by the persons examined, and attested or sworn to before and filed with the clerk of the court wherein the proceedings are pending, for the use of those interested in the estate. No assignor or debtor shall be prosecuted or punished for any matter or thing disclosed by him on such examination as had above. The costs of such proceedings to be paid out of the estate assigned, or by the application for the examination, as the judge in each case may deem proper (*Id.*).

Art. 273. May Discount Claims.—Claims not due may be allowed at their present value by discounting them at the legal rate. If any creditor holds collateral security of less value than his debt, the value thereof may be estimated by the assignee, and only the difference between such sum and the debt shall be allowed (*Id.*).

Art. 274. Final Report of Assignee.—If any assignee shall desire to be finally discharged, he may make a sworn report of his proceedings under the assignment, showing the moneys and assets that have come into his hands, and how the same

have been disbursed and disposed of. Such report shall thereupon be filed and recorded in the office of the county clerk of the county in which the assignment is recorded. No action shall be brought against such assignee by reason of anything done by him under the assignment as shown by his report, unless the same be brought within twelve months from the time of the filing thereof, as aforesaid; and any moneys or funds on hand shall be deposited in the district court subject to be paid out upon the decree of said court (*Id.*).

3.

## SPECIFICATION OF ERRORS.

1. The Supreme Court of Texas erred in refusing the application for writ of error and declaring that the opinion of the Court of Civil Appeals is correct and in thereby holding that Title 12, Texas Revised Statutes 1925 (Assignment for Creditors, Articles 261-274), is valid and that such state law does not conflict with and is not repugnant to Article 1, Section 8, cl. 4, of the Constitution of the United States.

2. The Supreme Court of Texas erred in refusing the application for writ of error and declaring the opinion of the Court of Civil Appeals is correct and in thereby holding that Title 12, Texas Revised Statutes 1925, (Assignment for Creditors, Articles 261-274) is valid and thereby holding that such state law does not conflict with and is not repugnant to the National Bankruptcy Act.

3. The Supreme Court of Texas erred in refusing the application for writ of error and declaring that the opinion of the Court of Civil Appeals is correct and in thereby holding that Title 12, Texas Revised Statutes 1925, is valid and is not conflicting with nor repugnant to the National Bankruptcy Act and that the deed of assignment protects the funds in the hands of the assignee from garnishment in a suit timely filed by appellees who are non-assenting creditors and who could not themselves on account of the smallness of their claim and without the cooperation of other creditors, invoke the jurisdiction of the bankruptcy court, although the bankruptcy act was open and available to the insolvent corporation who chose the relief provided under the state law in preference to the relief provided under the federal act.

4. The Supreme Court of Texas erred in refusing the application for writ of error and declaring that the opinion of the Court of Civil Appeals is correct, and that the questions at issue have been definitely settled by the Supreme Court of Texas in the cases of *Patty-Joiner* v. *Cummins*, 93 Tex. 598, and *Hajek* v. *Luck*, 96 Texas 517, and thereby holding in favor of the validity of Title 12, Texas Revised Statutes 1925, and declaring the state law valid and binding both as it relates to the distribution of the property under the assignment and the releases to be given thereunder for the unpaid portion of the debts.

4.

## ARGUMENT.

I. Title 12, Texas Revised Civil Statutes 1925, "Assignment for Creditors" Act (Articles 261-274), as applied to this case, is in conflict with and repugnant to Article 1, Section 8, Clause 4, of the Constitution of the United States and the National Bankruptcy Act.

(a) The assignment in question is purely under the Texas Statute and the question of the validity of a common law assignment is not raised.

In the trial court the case was tried upon an agreed statement of facts from which the following is quoted:

> "In compliance with the statutes and ACTING UNDER THE AUTHORITY THEREIN CONFERRED AND PURSUANT THERETO, said Arthur Star, garnishee herein, as such assignee, took possession of all of the assets and property of said corporation and proceeded to convert same into cash" (R. p. 8).

The validity of a common law assignment is therefore not involved and as stated by this Court in *International Shoe Company* v. *Pinkus*, 278 U. S. 261, 49 S. Ct. 108, 110, 73 L. Ed. 318:

> "As all the proceedings were had under the Arkansas Insolvency Law, we need not decide whether, INDEPENDENTLY OF STATUTE, an assignment for the benefit of creditors on the conditions specified in the decree would protect the property of the insolvent from seizure to pay the judgment. And, as the passage of the Bankruptcy Act superseded the state law, at least in so far as

it relates to the DISTRIBUTION of property and RELEASES to be given, plaintiff in error is entitled to have its judgment paid out of the funds in the hands of the receiver.''

(b) Appellants could not themselves, on account of the smallness of their claim and without the cooperation of other creditors, invoke the jurisdiction of the bankruptcy court, and they timely (within four months) proceeded by garnishment against the assignee.

Here, as in International Shoe Company vs. Pinkus, appellants could not themselves on account of the smallness of their claim ($103.08), without the cooperation of other creditors invoke the jurisdiction of the bankruptcy court and in less than four months after the execution of deed of assignment proceeded by garnishment against the assignee, the deed of assignment being executed on March 13, 1931 (R. p. 3), and the garnishment suit being filed on April 9, 1931 (R. p. 5), appellants having refused to accept under the assignment.

(c) This Court has held under such facts that a judgment creditor may proceed in the state court and attach funds in the hands of the trustee or assignee who attempts to hold the funds by virtue of the invalid state insolvency law.

The facts here are in all respects the same as were before this Court in International Shoe Company vs. Pinkus.

This Court in that case stated the issue to be, quoting from that decision:

> "The question is, whether in the absence of proceedings under the Bankruptcy Act, what was done in the Chancery Court protects the property in the hands of the receiver from seizure to pay the judgment held by plaintiff in error."

Here as in the Pinkus case the property was transferred to the assignee pursuant to the state statute imposing conditions to secure the debtor's discharge on compliance with the statute.

Appellants could not invoke the jurisdiction of the bankruptcy court because of the smallness of their claim. Appellants did not, as in *Boese* v. *King*, (108 U. S. 379, 385, S. Ct. 765, 769, 27 L. Ed. 760), wait until the expiration of time allowed for the filing of petition in bankruptcy and then in the state court seek to obtain relief but appellants promptly acted (within the four months period in which bankruptcy could have been filed) and attached the funds in the hands of the assignee, thus creating here the distinction so clearly drawn by this Court between the holding in the Pinkus case and the holding of this Court in Boese vs. King.

(d) The Texas Assignment Act is an insolvency law, providing as a condition for the privilege of sharing in the distribution that the debtor will be discharged by a compliance with the statutory terms and has in it each of the five elements found in the Arkansas Statute and referred to and designated by this Court as obnoxious and repugnant to the Bankruptcy Act.

This Court in declaring the Arkansas Statute an insolvency law referred with approval to the case of Weedman Stave Company, (D. C.) 199 Fed. 948, from which we quote:

> "The elements of an insolvency law are, insolvency, surrender of property, its administration, by receiver or trustee, distribution of the assets among the creditors, and a provision for priority or other matters not permissable in the absence of such a statute. A PROVISION FOR THE DISCHARGE OF THE DEBTOR FROM THE UNPAID BALANCE OF HIS DEBTS IS NOT ESSENTIAL TO MAKE IT AN INSOLVENCY LAW."

Each of these elements are to be found in the Texas Statute.

This Court in the Pinkus decision declared in reference to the Arkansas Statute:

> "It is apparent without comparison in detail of the provisions of the Bankruptcy Act with those of the Arkansas Statute, that intolerable inconsistencies and confusion would result if that insolvency law be given effect while the national act is in force. Congress did not intend to give insolvent debtors seeking discharge, or their creditors seeking to collect claims, choice between the relief provided by the Bankruptcy Act and that specified in state insolvency laws. States may not pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations."

This Court in the Pinkus case distinctly pointed out five elements in the Arkansas Statute which were declared to be obnoxious and repugnant to the Bankruptcy Act and which would give rise to these inconsistencies and confusion. Quoting from the Pinkus case these five elements of insolvency are:

First: It provides for surrender by insolvent of all his unexempt property to be liquidated by a trustee for the payment of debts under the direction of the Court.

Second: It classifies creditors, prescribes the order of payment of their claims.

Third: And gives preference to those fully discharging the debt in consideration of pro rata distribution.

Fourth: The insolvency of Pinkus was covered by its (the Bankruptcy Act's) provisions, he could have filed a voluntary petition.

Fifth: His application in the state court for the appointment of a receiver was an act of bankruptcy.

Because of these five elements the Arkansas Statute was declared to be an insolvency law, and that it operated within the field occupied by the bankrupt court.

Now, if the Texas Statute contains *each* of these five elements of insolvency, it logically follows that such statute is superseded in so far as it relates to the *distribution* of property and *releases* to be given and appellants are entitled to have their judgment paid out of the funds in the hands of the assignee as declared in the Pinkus case.

Let us compare in detail Title 12, Revised Texas Statutes, with the Arkansas Statute (R. p. 38), in relation to these *five elements of insolvency*, pointed out in the Pinkus case upon which this Court declared the Arkansas Statute superseded.

First: Article 261 of the Texas Statute provides for the surrender of all unexempt property to be administered by the assignee for the payment of the debts. This is done under the supervision and control of the courts, the assignee being required to qualify and file a bond to be approved by the county or district judge. The statute provides for the removal of the assignee. It provides for the examination of the assignor before the county judge, either upon application of a creditor or upon the Court's own motion, and the Court may enforce attendance and obedience. An inventory is required to be filed with the clerk of the Court and a final report must be lodged with the Court, showing in detail all money and property received and how disbursed and the money left on hand is to be deposited with the District Court subject to be paid out under the decree of that Court. These provisions of the Texas Statute are almost identical in their operation with that of the Arkansas law.

Second: The Arkansas law classifies creditors and prescribes the order of payment of their claims. This provision of the Arkansas Statute is under Section 5888, Subdivision 1 (R. p. 39), and merely provides that the salaries of employees earned within three months and all laborers' wages shall be paid first, and afterwards the funds are to be pro rated among the accepting creditors. This Court, in the Pinkus case, in referring to this provision of the Arkansas Statute, said:

> "In pursuance of the statute, the Court ordered the receiver, after the expiration of ninety days, to pay the costs, next salaries earned within

ninety days, and then the claims of those who had duly filed their claims."

This provision of the Arkansas Statute operates *exactly as does the Texas Statute*, as, under the procedure in Texas, the assignee stands, as to the property conveyed, in the place of the assignor, in reference to liens and encumbrances and salaries of employees, taxes, rents, and other liens which are to be paid out of the estate as secured debts (Texas Jurisprudence, Vol. 5, p. 10, Sec. 45, and also Articles 5483 and 7269, Revised Civil Statutes of Texas, 1925, as to liens).

Third: The Texas Statute gives preference to accepting creditors as against nonassenting creditors exactly as does the Arkansas Statute.

Fourth: The insolvency of the Dallas Showcase and Manufacturing Co. was covered by the Bankruptcy Act and the corporation could have filed a voluntary petition in bankruptcy.

Fifth: The making of the assignment was an act of bankruptcy, even without any element of insolvency (*George W. West & Co.* v. *Lea Bros.*, 174 U. S. 590).

As the Texas Statute has, within its terms, and within its operation, each of the five elements of insolvency, that this Court found in the Arkansas Statute, and because of which this Court declared the Arkansas law superseded and suspended, we submit that the Texas Statute is for that reason equally obnoxious and repugnant to both the Bankruptcy Act and the Federal Constitution.

True, the Texas Supreme Court has declared the Texas Statute to be in no sense an insolvency law, but in so declaring, the state court is in apparent conflict with this Court, and this Court is, of course, not bound by the opinion of the state court on that issue. This court, alone, has the power to finally determine that question.

That this Court has definitely overruled the reasoning upon which the Supreme Court of Texas arrived at the conclusion that the Texas Statute is in no sense an insolvency law, is apparent by merely quoting from the decisions themselves, for in *Keating* v. *Vaughn,* 61 Tex. 518, 527, the Texas court held:

> "The statute in question is in no sense an insolvency law providing for the discharge of a debtor by a compliance with its terms, WITHOUT THE CONSENT OF THE CREDITORS, etc. * * *"
>
> "The statutes of this state do not provide for the discharge of a debtor from his liability and obligations to fully pay every debt he contracted UNLESS SUCH DISCHARGE IS CONSENTED TO BY THE CREDITORS."

The same reasoning was urged by the Arkansas Supreme Court in the Pinkus case in its attempt to uphold the validity of its state law, the Court saying (292 S. W. 996):

> "The Arkansas Statute in reference to insolvent debtors, simply authorizes the debtor to go in the chancery court and ask for the appointment of a receiver to take charge of his property and distribute the same among his creditors. * * *"

> "The statute does not prohibit creditors from filing petitions in bankruptcy and DOES NOT REQUIRE THEM TO RELEASE OR RELINQUISH THEIR DEBT OR CLAIM AGAINST THE DEBTOR. They may file their claim and participate in the proceedings or they may decline to do so and still have their judgment or claim against the debtor."

This contention on the part of the Arkansas Supreme Court, this Court distinctly overruled in the Pinkus case and in so doing overruled the very theory upon which the Texas Supreme Court had previously declared that the Texas Statute was in no sense an insolvency law.

The Texas Supreme Court also in an attempt to uphold a state law held that:

> "But is a statute which for the better protection of the creditor prescribes a mode for the administration of the estates of the insolvents under an assignment made by the debtors themselves which would be good at common law UNAIDED BY THE STATUTE, and like any other trust, could be enforced in a court of equity in the absence of a statute providing a mode of administration." *Keating* v. *Vaughn,* 61 Tex. 518, 527.

To the same effect is the opinion of *Hajek & Simicek* v. *Luck,* 96 Tex. 517, 74 S. W. 503, adopted by the Supreme Court as definitely settling the issues here.

It is a coincidence that the Arkansas Supreme Court likewise attempted to sustain the validity of the Arkansas Statute upon this identical theory and

that this Court overruled the contention in the following language, quoting from the Pinkus case:

> "We are of the opinion that the proceedings in the chancery court cannot be given this effect. The enforcement of state insolvency systems WHETHER HELD TO BE IN PURSUANCE OF STATUTORY PROVISIONS OR OTHERWISE WOULD NECESSARILY CONFLICT WITH THE NATIONAL PURPOSE TO HAVE UNIFORM LAWS ON THE SUBJECT OF BANKRUPTCIES THROUGHOUT THE UNITED STATES."

The Arkansas Supreme Court had held that WITHOUT GIVING ANY EFFECT TO THE STATUTE the insolvent by what was done in the chancery court could compel the same distribution and obtain for himself the same advantages as were contemplated by the state statute; in other words the Arkansas Supreme Court held, as did the early Texas decisions, that UNAIDED BY THE STATUTE the procedure was valid and the insolvent could obtain the same advantages as were stipulated in the statute itself. This Court has definitely and decisively overruled this contention in the answer that it gave to the very question in the Pinkus decision.

The history of the assignment laws of Texas is one of insolvency.

This Court in *Cunningham, Assignee,* v. *Wallace,* 125 U. S. 77, 31 L. Ed. 624, had this to say concerning it:

> "The assignment in question was made under a law of the State of Texas, passed on the 24th of

March, 1879, immediately after the repeal of the National Bankruptcy Law, and evidently INTENDED TO TAKE THE PLACE OF THAT LAW."

The original law as enacted, General Laws of Texas, regular session of the 16th Legislature, page 79, reads:

> "That every assignment made by an *insolvent debtor or in contemplation of insolvency,* for the benefit of his creditors shall provide, except as herein otherwise provided, for a distribution of all of his real and personal property."

In view of these express terms, the assignment statute was held to *apply only* to assignments by INSOLVENT PERSONS (Texas Jurisprudence, Vol. 5, p. 74, Sec. 14, footnotes 18 and 19).

The 1925 statutes omit the word "insolvent" and the words "in contemplation of insolvency," but the act still deals and attempts to operate with *insolvent debtors,* seeking a distribution of their assets for the benefit of creditors and seeking discharges from the unpaid portion of their debts.

That a state assignment act is an insolvency law was expressly declared in the Pinkus case from which we quote:

> "In *Boese* v. *King,* 108 U. S. 379, 385, 2 S. Ct. R. 765, 769, 27 L. Ed. 760, this court referring to the effect of the national act upon a *state insolvency law, similar to the Arkansas Statute* under consideration, said, etc."

The state law referred to as being similar to the Arkansas Statute in the above quotation was the New Jersey Statute which was entitled:

> "An Act to Secure to Creditors an Equal and Just Division of the Estates of Debtors Who Convey to Assignees for the Benefit of Creditors."

In another portion of the Pinkus decision is found the following language:

> "The opinion below is not supported by *Boese* v. *King, supra.* In that case there was an *assignment* under the New Jersey *INSOLVENCY LAW.*"

In another portion of the Pinkus decision is found this reference to the New Jersey assignment for the Benefit of Creditors Act:

> "• • • and, as the Bankruptcy Act has superseded the New Jersey INSOLVENCY LAW, etc."

It is true that recovery was not permitted in Boese vs. King, but in the Pinkus case this Court points out the reason in the following language:

> "The receiver was held not entitled to recover *because* the judgment creditors could have secured equal distribution by the institution of bankruptcy proceedings, but instead *they waited* until after the expiration of the time allowed for that purpose, and they by the New York suit sought to obtain preference and full payment."

(e) Intolerable inconsistencies and confusion would result if the state insolvency law be given effect while the national act is in force.

The effort by the state court to give effect to the state law has, in the very opinions referred to by the

Texas Supreme Court as definitely deciding the issues here, created a condition of great confusion and inconsistencies.

For example, in Patty-Joiner and Eubank Company vs. Cummins (reprinted here p. 43) where the creditor refused to enter into the assignment and proceeded to attach or garnishee the funds in the hands of the assignee, it was held that the Assignment for Creditors Act was not suspended by the National Bankruptcy Law *except* the provision for discharge of claims of consenting creditors who were paid as much as one-third.

From that opinion of the State Supreme Court a creditor would naturally assume that that provision of the assignment law discharging the unpaid portion of the debt was unenforceable as being in conflict with the National Bankruptcy Act and being superseded, would not bind an accepting creditor, who *as his only means of sharing in the distribution* of the assets of the insolvent debtor filed his claim with the assignee.

But such is not the effect of that decision for in Hajek and Simicek *et al.* vs. Luck (reprinted here on p. 51), one of the creditors of the insolvent, believing that the provision requiring a discharge was inoperative because of the decision in Patty-Joiner and Eubank vs. Cummins, filed his claim with the assignee and after receiving the statutory one-third, proceeded by suit for the collection of the unpaid portion of the debt. The assignment was a statutory one and the following question was certified to the Texas Supreme Court:

"Were the appellants discharged from further liability on the note, sued on by the facts stated?"

The answer of the Texas Supreme Court is as follows:

> "Therefore we think that the provision of the assignment in this case for a release of the accepting creditors does not require the aid of the statute to give it effect, *and that, even if the statute was sustained by the Bankrupt Act, the* creditors, who accepted and received under it one-third of the amount of their debts *thereby released the remainder.*"

These two decisions, prior holdings of the Texas Supreme Court, are referred to and adopted by the Texas Supreme Court, in the case at bar as deciding the issues here, yet these two decisions are utterly at conflict with each other, and have the direct effect of upholding the Texas statute, including the statutory discharge of the unpaid portion of the debts.

For, in Patty-Joiner & Eubank vs. Cummins, it is held that where a creditor refuses to join in the assignment, the assignment is good as to him, and he cannot interfere with the assignee by attaching or garnisheeing the funds held by such assignee.

And if the creditor accepts under the assignment and he receives the statutory one-third, he suffers a discharge and he may not file suit and obtain judgment for the unpaid portion of the debt, according to the Texas Supreme Court, in Hajek and Simicek *et al.* vs. Luck. By these two decisions the Texas Supreme Court has given full force and effect to the entire statute, including the statutory discharge, for it is an

empty and useless declaration to say, on the one hand, as in Patty-Joiner & Eubank vs. Cummins, that the Texas Statute is valid except the provision for discharge and then to say, in the later decision of Hajek and Simicek *et al.*, vs. Luck, that:

> "Therefore we think that the provision of the assignment in this case for a release of the accepting creditors does not require the aid of the statute to give it effect, *and that, even if the statute was sustained by the Bankrupt Act,* the creditors, who accepted and received under it one-third of the amount of their debts *thereby released the remainder.*"

These holdings of the Texas Supreme Court leave no avenue of escape to the Texas creditor. If he does not accept under the assignment he cannot share in the distribution of the estate, and neither can he attach or garnishee the funds or property in the hands of the assignee. If he does accept under the assignment, he suffers a statutory discharge, whether he wishes to or not. What has occurred in Texas under these decisions illustrates aptly the wisdom of the declaration made by this Court in the Pinkus case when this Court declared that intolerable inconsistencies and confusion would result if the state insolvency law be given effect while the National Act is in force, and these inconsistencies arise in these decisions in the attempt on the part of the state court to uphold the validity of the state law and at the same time recognize the supremacy of the National Bankruptcy Act.

The court below in adopting as correct the opinion of the Dallas Court of Civil Appeals (R. p. ....) refers to the former holdings of this Court in *Mayer* v. *Hellman,* 91 U. S. 496; 23 L. Ed. 377; *Boese* v. *King,* 108 U. S. 379; 27 L. Ed. 760; *Randolph* v. *Scruggs,* 190 U. S. 533; 47 L. Ed. 767; *Stellwagen* v. *Clum,* 245 U. S. 603; 62 Law Ed. 507; and *Straton* v. *New,* 51 Sup. Ct. Rep. 465, 469, as upholding the validity of the state law, but these decisions are not in point and they do not even remotely discuss the issue here.

The case of Straton vs. New is merely a case where the creditors had obtained and docketed judgments constituting liens on the real estate of defendants and had instituted a creditors' suit in a state court to marshal and enforce the lien and sell the real estate subject thereto and the question was certified to this Court—"Does the bankruptcy of defendant, *occurring more than four months* after the institution of creditors' suit oust the state court of jurisdiction and vest in the court of bankruptcy power to enjoin further proceedings in the state court?"

In Mayer vs. Hellman, the trustee in bankruptcy was not permitted to interfere with the assignment because *more than four months* had elapsed, but compare this case with *Pryan* v. *Hernheimer,* 181 U. S. 188, by this Court in which the assignee acquired no title as against the trustee in bankruptcy and where he sold the assets to an innocent purchaser who knew that a petition in bankruptcy had been filed and this sale was made before a trustee was appointed in the bankruptcy court, title did not pass to this innocent

purchaser because these proceedings were had *within the prescribed four months.*

In Boese vs. King, the creditors were not permitted to recover because they waited until after the expiration of the time allowed for the filing of a petition in bankruptcy and for the further reason that they themselves could have filed an involuntary petition without the cooperation of other creditors.

It will be further observed that in Mayer vs. Hellman, and Stellwagen vs. Clum, this Court was dealing with the Ohio Statute which CONTAINED NO PROVISION WHATEVER FOR A DISCHARGE of the insolvent debtor.

The decisions point this out particularly for in Mayer vs. Hellman, this Court said:

> "It does not discharge the insolvent * * * it leaves his after-acquired property liable to his creditors precisely as if no assignment had been made."

And in Stellwagen vs. Clum, this Court declared:

> "Indeed there is not now, any more than when Mayer vs. Hellman was decided, any attempt in the Ohio law to provide a discharge of the debtor from his existing debts."

In the case of Stellwagen vs. Clum it was a question of compensation to be allowed in the bankruptcy court and this Court refused to admit the validity of the assignment in answering the certified questions by declaring that compensation could not be allowed *under the deed of assignment* but it would be allowed

able only for the services that had proven beneficial in the preservation of the estate, the allowance was upon purely equitable grounds and *not under the deed.* This case certainly does not support the decision below.

The court below discusses the case of Randolph vs. Scruggs but seems to have overlooked the important fact that the assignment was made in 1903, that the insolvent was a corporation, and under the bankruptcy law *then* existing was not permitted to file a *voluntary* petition. The assignment in that case therefore did not give the corporation a *choice* of remedies. It was not until 1910 that corporations were permitted to file *voluntary* petitions in bankruptcy. There was no attempt in that case to evade the operation of the bankruptcy law nor to interfere with it and until some creditors filed an involuntary petition, that corporation pursued the only course open to it in the distribution of its property among its creditors.

These cases referred to by the Dallas Court of Civil Appeals (R. p. 13) and adopted as correct by the Texas Supreme Court (R. p. 58) are clearly not in point and do not support the validity of the Texas law.

(f) The national purpose as pronounced by the Constitution and as declared by this Court to establish uniformity necessarily excludes state regulations dealing with insolvency.

This Court has many times referred with approval to the case of *Gutwillig,* 90 Federal 475, from which we quote:

"The object of the Bankruptcy Act is declared to be 'to establish a uniform system of bankruptcy throughout the United States.' The most fundamental element in every system of bankruptcy has been to provide for and regulate the distribution of the bankrupt property among his creditors and to do this by means of the agencies created by the act. That *originally* was its *only purpose.* Later, a second element has been added to the provisions for the bankrupt's discharge, upon such terms and conditions as the acts prescribed. The present act fully prescribes both of these subjects. From the moment an act of Congress establishing a uniform system for the administration of the same assets, whether *originating in the state statute, or in the debtor's common law power to transfer* his property, and regulated, as in this state, by state law, *is necessarily superseded,* provided the Bankruptcy Act is invoked by creditors within the statutory period of limitation. Both systems cannot operate side by side as respects the same estate; the one must necessarily supersede the other; and the state voluntary systems must yield to the system established by Congress pursuant to the Constitution. Voluntary assignments of all of the debtor's property in trust for creditors are just as incompatible with the purposes of the Bankrupt Act as state insolvency systems, and for precisely the same reason; viz., because if allowed to stand as against the trustee in bankruptcy, they defeat the most essential elements of the bankrupt law; namely, the distribution of the debtor's assets in a manner prescribed by the Bankrupt Act and through the agencies to which that act commits them."

It was held in *Gutwillig*, 92 Federal 357, that:

"We entertain no doubt that a voluntary general assignment, with or without preferences, made by an insolvent debtor, within the prescribed

four months, *is fraudulent, and intended by him to 'hinder, delay, and defraud' creditors, within the meaning of the section, because its necessary effect is to defeat the operation of the Bankrupt Act and the rights of the creditors to such an administration of the assets as that act is intended to provide.* The reasons for this conclusion, and the authorities in support of it, are so fully and satisfactorily set forth in the opinion of Judge Brown in the court below that we do not deem it necessary to enlarge upon them. They are summarized in the following extract from his opinion:"

This Court in *Bryan* v. *Hernheimer,* 181 U. S. 188, declared:

> "The general assignment made by Abraham to Davidson did not constitute Davidson an assignee for value, but simply made him an agent of Abraham for the distribution of the proceeds of the property among Abraham's creditors. This general assignment was of itself an act of bankruptcy, without regard to the question whether Abraham was insolvent, Bankrupt Act of July 1, 1898, Chap. 541, Sec. 3 (30 Stat. at L. 545); *George M. West Co.* v. *Lea Bros.,* 174 U. S. 590, 43 L. Ed. 1098, 19 Sup. Ct. Rep. 836."

In the case of *Louis Neuburger, Inc.,* 240 Federal 947, it was held that an assignment is properly regarded as potentially a fraud upon the bankruptcy law and upon the creditors.

In the case of *Federal Mail and Express Company,* 233 Federal 691, stated in reference to assignments, that this method of administration involves constant problems as to jurisdiction of the respective courts and in the end secures what many bankrupts desire,

the benefits of both the state insolvency law, and for the creditors, the safeguards of neither.

In the case of *In re Smith,* 92 Fed. 135, it was held that declaring such an assignment an act of bankruptcy amounted to a prohibition of the act and the assignee under the inoperative state law takes no title against the creditors by the deed of assignment and all of the acts touching the estate of the bankrupt as well as all of the acts by the state court in the administration of the bankrupt are unauthorized and void and will be treated as nullities whenever drawn in question.

In the case of *Utley et al.,* 235 Fed. 905, it was held that the main purpose of the bankruptcy law is to secure equality among the creditors in the distribution of the assets, and because of this, it may well be a further policy of the bankruptcy law not to permit any tribunal other than that constituted by the bankruptcy law from thus taking it out of the power of creditors to enforce the payment of their claim.

To give effect to the state law deprives the creditor of the right to have the assets of the insolvent handled through the agencies created by Congress, and gives to the insolvent the right to select those agencies himself, and the creditor is powerless under the decisions of this state, to obtain an adjudication of the insolvent's property, and is also powerless to obtain his pro rata share of the estate without suffering a discharge of the unpaid portion of the debt. *Hajek and Simicek* v. *Luck,* 96 Texas 517, 74 S. W. 305. Instead of the trustee being appointed by the bankruptcy court, the

insolvent himself chooses the assignee, and the creditor may not refuse to accept and proceed by attachment or garnishment. *Patty-Joiner & Eubank Co.* v. *Cummins,* 93 Texas 598, 57 S. W. 566, and the holding of the Court in the case at bar.

Since the decision by this Court in the case of International Shoe Co. vs. Pinkus, the Texarkana, Texas, Court of Civil Appeals has had this issue before it, and declared the Texas Assignment Laws superseded and suspended. This case is reported in 37 S. W. (2d) 776, *Johnson* v. *Chapman Milling Co.,* from which we quote the following:

> "The facts of this case are not materially different from those of *Patty-Joiner & Eubank* v. *Cummins,* (Tex. Civ. Apps.) 59 S. W. 297, *Id.,* 93 Tex. 598, 57 S. W. 566, decided by Texas courts, and *International Shoe Co.* v. *Pinkus,* 173 Ark. 316, 292 S. W. 996, decided by Arkansas courts, where it was held, in effect, that an assignment under a state statute by an insolvent debtor of his property for the benefit of his creditors who accepted thereunder was valid, 'except as against proceedings seasonably taken under the National Bankrupt Act.' In the Pinkus case a writ of error was granted by the United States Supreme Court (278 U. S. 281, 49 S. Ct. 108, 110, 73 L. ed. 318) which reversed the judgment of the Arkansas Supreme Court, holding that in enacting the Bankruptcy Act (11 U. S. C. A. Sec. 1, *et seq.*) 'Congress (quoting) did not intend to give insolvent debtors seeking discharge or their creditors seeking to collect claims, choice between the relief provided by the Bankruptcy Act and that specified in state insolvency laws.' 'States,' the court added, 'may not pass or enforce laws to interfere with or complement the

Bankruptcy Act or to provide additional or auxiliary regulations.'

"It may be, as argued by appellant, that the Texas assignment law (Title 12, R. S. 1925) is not an 'insolvent law' in the sense the Arkansas Statute was, but it cannot be doubted, we think, that the effect of holding it to have been operative in the insolvent debtor's (Beasley's) favor would have been to have given him 'choice between the relief provided by the Bankruptcy Act and that specified' in the Texas Statute, a thing the Federal Supreme Court said should not be done; and, further, would be to 'complement the Bankruptcy Act or to provide additional or auxiliary regulations,' which that court held a state could not do.

"As we view the matter, giving effect, as he was bound to, to the ruling in the Pinkus case the trial court could not have held otherwise than he did, and this court, also bound as it is to respect that ruling, cannot do otherwise than affirm the judgment."

Because of the conflict between the above opinion and the opinion of the Dallas Court of Civil Appeals in the case at bar, the Texas Supreme Court accepted jurisdiction, and overruled the decision of the Texarkana Court of Civil Appeals and declared the opinion of the Dallas Court of Civil Appeals a correct determination of the law, from which decision of the Texas Supreme Court appellants bring error to this Honorable Court.

While we do not consider the question properly raised here as to whether or not an insolvent corporation has the common law power or right to dispose of its assets and that this right is unrestrained and paramount and beyond the control of the Federal Congress acting under the constitutional warrant, still the opin-

ions of the Texas Supreme Court as well as the opinion of the Arkansas Supreme Court, rely upon that alleged common law right or power. If this issue is involved, we submit that Congress has the power to impose reasonable restraint upon this natural right where such reasonable restraint is for the common good.

This power of the government and of the state has been expressly recognized by the Texas courts, for in *Nash Hardware* v. *Morris*, 146 S. W. 876, it was held that:

> "The object of government is to impose that degree of restraint upon human actions which is necessary to the uniform and reasonable conservation and enjoyment of private rights. Government and municipal law protect and develop, rather than create private rights. The conservation of private rights is attained by the imposition of a wholesome restraint upon their exercise, such a restraint as will prevent the infliction of injury upon others in the enjoyment of them; it involves a provision of means for enforcing the legal maxim, which enunciates the fundamental rule of both the human and natural law: *'Sic utere tuo, ut alienum non laedas.'* The power of the government to impose this restraint is called 'police power.' Tiedman's Lim. of Police Power."

Also in the case of *Owosso Carriage & Sleigh Co.* v. *McIntosh & Warren*, 179 S. W. 257, we find the following:

> "The defendants in error assail the constitutionality of the act. If the act is an unreasonable restraint of the natural rights of the owners of merchandise over their control and use of their property, and their right of contract connected therewith, it should be held unconstitutional; but, if it is merely a proper exercise of the police power

of the state in a wholesome restraint upon the said natural rights for the common good, then the said act would not be repugnant to the organic law. An unreasonable restraint of the natural rights of the owners of merchandise over the control and use of their property, and their right of contract connected therewith, would be intolerable, and violative of rights guaranteed under the Constitution; but a wholesome restraint upon the natural rights of such owners for the common good should be within the police power of the state, and therefore valid."

In the case of *Railway Co.* v. *Dallas*, 85 S. W. 648, it was declared that the legislature may in the exercise of the police power regulate by reasonable requirements the business transactions of its citizens.

Besides, unlike the Texas statutory assignment, at common law, an assignment does not pay the debts, nor does it discharge the assignor from liability for their payment. The indebtedness of the assignor is discharged only to the extent of the actual payment out of the proceeds of the property. *Pillsbury* v. *Kingen*, 33 N. J. Eq. 299; *James* v. *Lederer Strain Co.*, (Wyoming) 233 Pac. 137.

The effect of the decisions of this state arising from the opinion of the Supreme Court in *Hajek and Simicek* v. *Luck*, 96 Texas 517, 74 S. W. 305, is to extend this common law power to the point where it gives the insolvent the right to make an assignment and to impose a condition in such assignment for a discharge for the unpaid portion of the debt, for in that case the assignment was purely statutory, made under the statute, the validity of which is at issue here. The assignment in both Patty-Joiner & Eubank Co. vs. Cummins, and in Hajek and Simicek vs. Luck, were under the Texas Statute, and neither of them were at common law. Yet a creditor may not re-

fuse to accept and attach or garnishee the funds in the hands of the assignee nor may he accept and then proceed by suit to collect the unpaid portion of the debt, under the authority of these two decisions which are declared to have disposed of and settled the issues here presented and to have definitely settled the law of this state on this subject (R. p. 58).

When Congress enacted the bankruptcy law, it proceeded under a grant of power expressly given to it by the Federal Constitution, Article 1, Section 8, Clause 4. That power given to Congress by the Constitution is unrestricted and paramount, and it cannot be doubted that in the national purpose to establish uniformity, Congress had the power to impose that degree of restraint upon natural rights that would carry out the constitutional purpose.

If an insolvent may, by assignment, require the creditors to accept thereunder, and give such insolvent a discharge or if he may, by such assignment, so divest himself of title as to place his estate beyond the reach of his creditors, he has been given the power to enact a bankruptcy law of his own, and to proceed with the disposition of his estate in utter disregard of the National Bankruptcy Act. That an insolvent may not thus create his own bankruptcy law and thus destroy the national purpose of requiring uniformity in bankruptcy matters, hardly needs a presentation of argument. The question answers itself, in the negative.

## CONCLUSION.

This Court, in the Pinkus decision, declared: "The purpose to exclude state action for the discharge of insolvent debtors may be manifest without specific declaration to that end." And that the power of

Congress to establish uniform laws on the subject of bankruptcies throughout the United States is unrestricted and paramount. The Texas Statute contains a provision for the discharge of the insolvent who makes an assignment under the state act. Under the decisions in Texas, one who refuses to accept under the assignment because he does not desire to discharge the unpaid portion of the debt, is bound by the assignment to the extent that he may not garnishee or attach the funds or property in the hands of the assignee, according to the decision below. In other words, the assignment is not good only between the insolvent and the accepting creditors, but is good as to all of the creditors, in that, as a condition precedent to the privilege of sharing in the proceeds derived from the insolvent's estate, the creditor must necessarily agree to the stipulation for the discharge of the unpaid portion of the debt upon compliance with the statutory provisions.

The provision for discharge is equally binding upon those who, although objecting to the discharge, accept under the assignment, for such creditors are not permitted to sue and recover judgment for the unpaid portion. *Hajek & Simicek* v. *Luck*, 96 Texas 517, 74 S. W. 305 (reprinted here on p. 51).

While the amount involved in this appeal is insignificant, the judgment of this Court will have a far-reaching effect. The supremacy of the Bankruptcy Act is here clearly at issue, as against a state insolvency law. There is no more active competitor of the Bankruptcy Act in the field of insolvency than general assignments for the benefit of creditors, and whether these assignments are made under the authority of some state law or at common law, they create the same inconsistencies and confusion, and

involve the same constant problems of jurisdiction of the respective courts, and in the end they secure to the bankrupt all of those special benefits arising from the selection of his own assignee, and the management of the estate through the agencies that he himself has chosen, and denies to the creditors those safeguards intended that the creditors should have under the bankruptcy proceeding.

We respectfully submit that one who has the privilege of becoming a bankrupt under the Bankruptcy Act, cannot ignore the privileges of that law and become a voluntary bankrupt or a voluntary insolvent under a state law, and thereby deprive non-assenting creditors of the right expressly given by Congress, to have the estate of the insolvent administered under the supervision of the bankruptcy court and through a trustee therein.

On July 12, 1932, the Supreme Court of Washington in the case of *Tacoma Grocery Company* v. *G. L. Doersch,* reported in 12 Pacific (2d) 929 and 21 A. B. R. (N. S.) 472, held that an assignment for the benefit of creditors, made under the state statute, did not prevent creditors, not properly filing claim, from seizing debtor's property to pay judgment, since the statute was superseded by the bankruptcy act, following the decision of this Court in International Shoe Company vs. Pinkus.

But this Court has already declared, in the Pinkus case, that Congress did not intend to give insolvent debtors seeking discharge, or their creditors seeking to collect claims, choice between the relief provided by the Bankruptcy Act, and that specified in state insolvency laws, and states may not pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations.

This Court stated further, in the Pinkus case, that the enforcement of state insolvency systems, whether held to be in pursuance of statutory provisions *or otherwise*, would necessarily conflict with the national purpose to have uniform laws on the subject of bankruptcy throughout the United States.

If the distribution among the creditors of the property of insolvent debtors is committed *exclusively to the courts of bankruptcy* appointed by such law, then we have a uniform system by which such distribution may be effected, but until the bankruptcy court is declared to have such *exclusive* power to distribute the assets of insolvent debtors, there can be no uniform system of insolvency in the United States. As long as state systems remain operative, and under such state laws the distribution of insolvent assets is attempted, then the constitutional purpose is destroyed, and these state systems constitute a continual infringement upon the requirement of uniformity in these matters.

The element of discharge in an insolvency system is of minor consequence, as the primary object of the bankruptcy law is to safeguard the distribution of insolvents' estates through the agencies created by the act. True, the discharge is an advantageous feature to the insolvent, but when one views the Bankruptcy Act from the standpoint of the creditor, his primary interest lies in the handling of the insolvent's estate through those agencies created by Congress, looking toward a uniform system by which these estates may be distributed, and to deprive the insolvent of selecting for himself a private system by which these distributions might be effected, and the privileges of the Bankruptcy Act ignored. Surely it will not be held that the element of discharge is the vitally essential point in a conflict between the national and state insolvency

laws. To establish a uniform system for the *distribution* of insolvents' estates, was originally the *only purpose* of the Bankruptcy Law. The element of discharge was placed in the act *later*. We therefore submit that, independent of any question in the Texas Statute in regard to a discharge of the insolvent, the statute creates an infringement upon the constitutional purpose of having a uniform system for the *distribution* of these estates, among the creditors. The rights of the creditors to have the distribution made through the agencies created by Congress, we submit is of paramount importance. This right does not exist where an insolvent is permitted to make an assignment for the benefit of his creditors, and to bind the creditors thereby.

There is now, and always will be continual warfare between these two systems of handling the estates of insolvent debtors. For this reason the opinion of this Court, in this case, will go far toward safeguarding that uniformity which has by this Court been declared to be the constitutional purpose.

We respectfully submit that the judgment of the court below should be reversed, and appellants should be permitted to enforce the collection of their judgment against the funds in the hands of the assignee, as was declared by this Court in the Pinkus decision, and that Title 12, Revised Civil Statutes of Texas be declared superseded and suspended by the National Bankruptcy Act.

Respectfully submitted,

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Spearman Webb

## APPENDIX.

*Patty-Joiner & Eubank Co.* v. *Cummins,*

Supreme Court of Texas,

June 11, 1900,

57 S. W. 566.

GAINES, C. J. This case comes to us upon certified questions. The statement and questions as certified are as follows:

"The above-entitled cause is an appeal from a judgment of the county court of Hunt County. On Febuary 2, 1899, W. S. Bedford & Son executed a general assignment conveying all their property subject to execution to R. B. Cummins, for the benefit of all their creditors who would agree to accept under the same and release them. The assignment was in the usual form, and was a statutory assignment as provided by the statutes of the state of Texas. Attached to the assignment was a list of the creditors and a schedule of the assets of the assignors. The assignee accepted the trust and proceeded to administer the property. Patty-Joiner & Eubank Company, a creditor of the assignor's, did not accept under the assignment, but sued and obtained a judgment against W. S. Bedford & Son, and on March 9, 1899, pending the suit, sued out a writ of garnishment against R. B. Cummins, the assignee of W. S. Bedford & Son. The assignee answered the writ of garnishment; denying that he

was indebted to, or had any effects in his hands belonging to W. S. Bedford & Son, or that he knew of any person so indebted, or in possession of effects. Patty-Joiner & Eubank Company controverted the answer, alleging the making of the assignment, and that the garnishee had more than sufficient funds, proceeds of the assigned property, to pay their debt, and further alleging that the national bankruptcy act was in force at the time the assignment was made, and contending that the passage of the act suspended the statutory assignment law of the state of Texas, and that R. B. Cummins, the garnishee, who was the assignee under the assignment, was liable under the garnishment for the funds that were in his hands, proceeds of the assigned property, to the extent of the judgment obtained by the Patty-Joiner & Eubank Company against the said W. S. Bedford & Son. On the trial it was proved that the garnishee had property and money, the proceeds of said assigned property, in his hands, which would be subject to garnishment if it should be held that the assignment was invalid. The court below held that the passage of the bankrupt act did not suspend the state assignment law, so as to render the assignment invalid, and that it would only have the effect to set aside the assignment upon the institution of bankruptcy proceeding against the assignors, and rendered judgment discharging the garnishee. This court affirmed the judgment of the court below. Pending a motion for rehearing, this court desiring the instruction of the Honorable Supreme Court for the proper decision of an issue of law arising upon

the record, it is ordered that the following questions be certified to the Supreme Court of Texas, in accordance with Article 1043, Rev. St., to-wit:

'(1) Was the state assignment law of Texas suspended by the passage and going into effect of the national bankruptcy act? And, if so, is the money in the hands of the assignee, Cummins, subject to the garnishment of the Patty-Joiner & Eubank Company, the creditor of the assignors, W. S. Bedford & Son?

(2) By reason of the facts stated, was the assignment invalid?'

But for the fact that the assignors in the deed of assignment in question availed themselves of the privilege conferred by that provision of our assignment law which authorized them to exact discharges of the accepting creditors, provided they should receive from the assigned estate as much as one-third of their respective debts (Rev. St. Art. 73), there would be no difficulty in determining the question. The assignment, being of all the debtors' property, and being for the equal benefit of all the creditors of the assignors, would undoubtedly have been good as a common-law conveyance, even if it should be held that the effect of the passage of the United States bankrupt act of 1898 was to wholly suspend the operation of our statutes which provide for general assignments by insolvent debtors. In *Mayer* v. *Hellman*, 101 U. S. 496, 23 L. Ed. 377, it was held that such an assignment under the laws of Ohio was good, even as against an assignee in bankruptcy, when executed six months

before proceedings in bankruptcy were taken against the debtor; and that decision would be conclusive of the question certified but for the fact that the law of Ohio did not provide for the discharge of the assignors. That case arose under the bankrupt law of 1867, and, while there is a difference between that act and the now existing law, that difference is immaterial, in so far as it affects the question before us. The present law expressly declares the making of a general assignment for the benefit of creditors an act of bankruptcy. It was an act of bankruptcy under the former statute, as held by the courts (*Boese* v. *King,* 108 U. S. 379, 2 Sup. Ct. 765, 27 L. Ed. 760) there being, however, no express declaration to that effect in the act itself. Under the former law, a proceeding to have a debtor who has made a general assignment declared a bankrupt had to be executed within six months. The period is reduced to four months by the present act. If, then, the assignment under consideration was good at common law, it is a good assignment in this proceeding, and was from its inception good for all purposes, except against proceedings in bankruptcy instituted under the bankrupt act of 1898 within four months from the day of its execution. The only doubtful feature of the instrument is the provision which exacts releases, and the question is, does that make the assignment void at common law? There is a conflict of authority upon the question, and, so far as we have been able to discover, there has been no authoritative decision by this court upon the point. The accepted rule in England seems to be that, if the assignment

conveys all the debtor's property, to exact a release as a condition of participating in its benefits does not make it void. *Rex* v. *Watson*, 3 Price 6; *Janes* v. *Whitebread*, 5 Eng. Law & Eq. 431; *Jackson* v. *Lomas*, 4 Term R. 166. The rule seems to us a logical deduction from that other rule of the common law, that a debtor has the absolute right to prefer his creditors, and to appropriate all his property to pay one or more of them, to the exclusion of all others, provided that in no case more property be applied to the payment of a debt than is reasonably sufficient to satisfy it. The failing debtor may also appropriate any or all of his property to the securing of one or more of his creditors, provided the surplus be left subject to legal process in behalf of those who are unsecured. Since the debtor may directly appropriate his property to satisfy or secure any one or more of his debts, leaving others unsatisfied and unsecured, we fail to see how a creditor is injured by an assignment which exacts releases from those who accept under it. If the assignor could have preferred those who may see fit to accept, by transferring his property to satisfy or secure their debts, without making any provision whatever for his other creditors, how can the creditor who declines to accept such a deed of assignment complain, when the assignor may accomplish the same result by a mortgage in which the beneficiaries are expressly named? If it be urged that it is rigorous and unjust to a creditor to force him to release the debtor as a condition of his participation in the proceeds of the assigned estate, the answer is that he is

not compelled to accept, and that, if he declines to do so, he is in no worse position than if the debtor had directly applied the property to the payment or the securing of debts of those who may accept. That they are required to release does not affect him injuriously. It rather inures to his benefit. In so far as debts are discharged by releases, the volume of the indebtedness of the assignor is diminished to the extent of the debts so released, and this is clearly to the advantage of the remaining creditors, since it increases their chance of securing their claims from the future acquisitions of the assignor. But we may go further. That a bankrupt law of the United States does not necessarily render an assignment made under a state insolvent law invalid for every purpose is established by the decision of the Supreme Court of the United States in the case of *Boese* v. *King*, 108 U. S. 379, 2 Sup. Ct. 765, 27 L. Ed. 760. In that case, while the bankrupt act of 1867 was in force, an assignment was made in New Jersey under the statute of that state which provided for the discharge of the assignor from the debts of all accepting creditors. Certain creditors of the assignor, who did not accept under the assignment, procured a judgment in the state of New York against him; and an execution thereon having been returned unsatisfied, a receiver of the property of the execution debtors was appointed. The receiver, having obtained authority from the court to sue the assignees, brought suit against them to test the validity of the assignment, and to subject certain property of the debtor in the latter state to the payment of the judg-

ment. It was held that the making of the assignment was an act of bankruptcy; that the instrument was subject to be attacked and avoided by proper proceedings in the bankrupt court at any time within six months after it was executed, but that it was otherwise a valid conveyance of the property, although it might be that the provisions of the New Jersey statute for the distribution of the proceeds of the assigned property among, and the discharge of, the accepting creditors, were not enforceable, by reason of the bankrupt act. In their opinion the court say: 'If it should be assumed, for the purposes of this case, that the statute of New Jersey was, as to each and all of its provisions, suspended when the bankrupt act of 1867 was passed, it does not follow that the assignment by Locke was ineffectual for every purpose. Certainly, that instrument was sufficient to pass the title from Locke to his assignees. It was good as between them, at least, until Locke, in some appropriate mode or by some proper proceedings, manifested a right to have it set aside or canceled upon the ground of a mutual mistake, in supposing that the local statute of 1846 was inoperative. And in the absence of proceedings in the bankruptcy court impeaching the assignment, and so long as Locke did not object, the assignees had authority to sell the property and distribute the proceeds among all the creditors; disregarding so much of the deed of assignment as required the assignees, in the distribution of the proceeds to conform to the local statute. The assignment was not void as between the debtor and the assignees simply because it provided

for the distribution of the proceeds of the property in pursuance of a statute, none of the provisions of which it is claimed were then in force.' Four of the judges dissented from the conclusion of the majority in that case, but the effect of the bankrupt act upon a state insolvent law is a federal question, and therefore the decision of the court has a controlling effect upon us. The effect of the ruling is that, in so far, at least, as an insolvent law of a state provides for a release by the creditors, it is suspended by a bankrupt law of the United States, but that if the assignment convey all the debtor's property, subject to the payment of his debts, for the equal benefit of all his creditors who may accept under it, it is otherwise valid, except as against proceedings seasonably taken under the bankrupt act. This answers both questions."

*Hajek & Simicek et al.* v. *Luck,*

Supreme Court of Texas,

May 18, 1903,

74 S. W. 305.

GAINES, C. J. The following question has been certified for our decision:

"This was an action brought by the appellee in the court below to recover of the appellants, as the makers of a certain promissory note, a balance due thereon, after deducting a credit of more than 33 1/3%, received by the appellee, an accepting creditor, from the assignee of Hajek & Simicek in a general assignment made by them, in accordance with the stat-

ute of this state, for the benefit of such of their creditors as would accept the assignment and discharge them from further liability. The assignment was made subsequent to the passage of the national bankrupt act of July 1, 1898, 30 Stat. 544, c. 541 (U. S. Comp. St. 1901, p. 3418). The appellants Hajek & Simicek were partners, and joined in the assignment which was made by them. They were principals in the note, and the appellant John Hajek was their surety. No steps were ever taken to adjudicate them as bankrupts. The assignment was made more than four months before the bringing of this suit, and has been closed, leaving a balance due on the note sued on, for which the court below rendered judgment in favor of the appellee. This court being of the opinion that the case of *Patty-Joiner & Eubank Co.* v. *Cummins,* 93 Tex. 598, 57 S. W. 566, is not decisive of the question here presented, and desiring the instruction of the Honorable Supreme Court upon the question of law presented by these facts, respectfully certify the following question for its decision:

'Were the appellants discharged from further liability on the note sued on by the facts stated? Should the judgment in favor of the appellee be affirmed?'

The case of *Patty-Joiner & Eubank Co.* v. *Cummins,* 93 Tex. 598, 57 S. W. 566, referred to in the certificate, determines two questions: First, that an assignment made under the assignment law of this state which does not exact releases, though subject

to be set aside by proceedings in bankruptcy, seasonably instituted, was not otherwise void; and, second, that even such an assignment, which is made for the benefit of such creditors only as should accept under it and release the assignor from further liability, operated a transfer of the property, and that it was not subject in the hands of the assignee to a writ of garnishment by a nonaccepting creditor. But the question now presented, that is to say, whether the debt of a creditor who has accepted under an assignment of the latter class, and who has received under it 33 1/3% of his debt, is thereby released, was not involved in that case, and therefore not certified to us by the Court of Civil Appeals. As a matter of course we did not decide it. We did intimate, however, that the effect of the ruling of the Supreme Court of the United States in *Boese* v. *King,* 108 U. S. 379, 2 Sup. Ct. 765, 27 L. Ed. 760, is that, in so far as a general assignment law of a state provides for a release by the accepting creditors of an insolvent assignor, it is an insolvent law; that is to say, such a law as it suspended by a general bankrupt act of the United States. But in *Keating* v. *Vaughn,* 61 Tex. 524, it is said that: 'The statute in question is in no sense an insolvent law, providing for the discharge of a debtor by a compliance with its terms without the consent of the creditor, but is a statute which, for the better protection of creditors, prescribes a mode for the administration of the estates of insolvents under assignments made by the debtors themselves, which would be good at common law, un-

aided by the statute, and, like any other trust, could be enforced in a court of equity in the absence of a statute providing a mode of administration.'

But if it should be held that our statute, in so far as it makes provision for exacting releases, is an insolvent law, and therefore suspended by the bankrupt act of the United States, it does not determine the question now under consideration. We see no good reason why the assignment made in pursuance of the statute was not good, at least as a common law assignment. Nor do we see why, even if not subject to the regulations of the assignment law, the assignee could not take possession of the property, dispose of it, and divide the proceeds among the accepting creditors. Boese vs. King, above cited. The assignment would have been annulled by a proceeding in bankruptcy instituted within four months from the time of its execution. But no steps having been taken under the bankrupt act, no good reason suggests itself to our minds why any provision of the instrument valid at common law should not be given effect. That at common law an assignment is valid which provides for a discharge by the accepting creditors, is the opinion expressed by this court in the case of Patty-Joiner & Eubanks Co. vs. Cummins, above cited. The grounds for the conclusion are there stated, and need not be here repeated. Whether the determination of the point was necessary to the decision of that case, we need not now inquire. We are still of that opinion. Therefore we think that the provision of the assignment in this case for a

release as to the accepting creditors does not require the aid of the statute to give it effect, and that, even if the statute was suspended by the bankrupt law, the creditors, who accepted and received under one-third of the amount of their debts, thereby released the remainder.

We answer that the appellants were discharged on the note sued on by reason of the facts stated in the certificate, and that the judgment in favor of appellee should be reversed."